

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RONALD F. BUCHANAN, Individually and as  
Personal Representative of the Estate of RODNEY  
FOSTER BUCHANAN, Deceased, and JUDITH  
K. BUCHANAN,

UNPUBLISHED  
February 25, 2003

Plaintiffs-Appellants,

v

No. 238268  
Montcalm Circuit Court  
LC No. 00-000482-NO

DARRELL DUANE PUTANSU,

Defendant,

and

NICHOLAS HAROLD NOKES, PAUL ADAM  
ADAMS, and TRISHA LYNN STOUDT,

Defendants-Appellees.

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Before: Kelly, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendants' motions for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On July 14, 1998 defendant Darrell Duane Putansu beat decedent Rodney Buchanan to death.<sup>1</sup> It was common knowledge that Putansu and decedent were involved in a running feud. Earlier in the day Putansu asked defendant Paul Adam Adams to tell him if he saw decedent. Adams and defendant Nicholas Harold Nokes saw decedent, located Putansu at a party, and informed him of decedent's location. Nokes was aware that Putansu wanted to find decedent to

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<sup>1</sup> Putansu was convicted by a Montcalm Circuit Court jury of involuntary manslaughter, MCL 750.321, and was sentenced to five to fifteen years in prison. In *People v Putansu*, unpublished opinion per curiam of the Court of Appeals, issued November 21, 2000 (Docket No. 216502), another panel of this Court affirmed Putansu's conviction. The parties relied on testimony given at Putansu's trial to support their arguments in the instant case.

either talk with him or engage him in a fight. When Adams and Nokes left the party, Putansu was still present. However, at some point during the evening defendant Trisha Lynn Stoudt drove Putansu to decedent's location. Stoudt had heard a rumor that Putansu intended to fight decedent; however, Putansu did not announce any such intentions. Putansu testified at his trial that he intended to talk with decedent and put an end to the feud, or to fight with him if necessary. Stoudt waited in the car while Putansu assaulted decedent, and then drove him from the scene.

Plaintiffs filed suit alleging liability against Putansu based on theories of assault and battery and wrongful death, and alleging liability against defendants based on a theory of concert of action. Plaintiffs alleged that Nokes and Adams told Putansu where decedent was located and encouraged him to confront decedent, and that Stoudt encouraged the assault by driving Putansu to decedent's location. Defendants filed separate motions for summary disposition pursuant to MCR 2.116(C)(10), arguing that no evidence showed that they acted tortiously pursuant to a common design. The trial court granted the motions, concluding that the evidence showed that defendants engaged in a series of independent, nontortious actions. Nokes asserted for the first time during oral argument on the motions for summary disposition that a concert of action claim was no longer viable in light of MCL 600.2956, which provides that joint damages are not available in an action for wrongful death. The trial court declined to address this issue.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

In order to prove a claim of concert of action, a plaintiff must show that "all defendants acted tortiously pursuant to a common design." *Abel v Eli Lilly & Co*, 418 Mich 311, 338; 343 NW2d 164 (1984). If the plaintiff satisfies these elements, a legal fiction is created whereby each defendant is deemed to be the cause in fact of the plaintiff's injury even though only one person may have actually caused the injury. *Holliday v McKeiver*, 156 Mich App 214, 217-218; 401 NW2d 278 (1986). The plaintiff need not establish that the defendants had an express agreement to act in concert. The showing of a tacit agreement is sufficient. *Cousineau v Ford Motor Co*, 140 Mich App 19, 32; 363 NW2d 721 (1985).

Plaintiffs argue that the trial court erred by granting defendants' motions for summary disposition. Plaintiffs assert that at a minimum the evidence, viewed in a light most favorable to them, created a question of fact as to whether defendants knew that Putansu intended to assault decedent and acted to further Putansu's plan. We disagree and affirm the trial court's decision. The evidence showed that Nokes and Adams informed Putansu of decedent's location; however, no evidence showed that Nokes and Adams encouraged Putansu to go to that location. Nokes and Adams did not appear at the location where Putansu assaulted Adams. The evidence showed that Stoudt drove Putansu to the location, but did not participate in the altercation between Putansu and decedent. The trial court correctly found that no question of fact existed as to whether defendants even tacitly agreed to aid or encourage Putansu in his plan to assault decedent because the evidence did not show that Putansu had a firm plan to do so. No evidence showed that Putansu announced such a plan. He testified at his trial that he went to decedent's location intending to talk with decedent to end the feud or, if that was not possible, to fight with decedent.

Plaintiffs' reliance on 5 Restatement Torts, 2d, § 876(b), p 315, which states that a person is liable for harm to a third person resulting from the tortious conduct of another if the person knew that the other's conduct constituted a breach of duty and gave substantial aid and encouragement to the other person, is misplaced. The evidence did not create a question of fact as to whether defendants aided Putansu based on their knowledge that he intended to assault decedent. To prove a claim of concert of action, the plaintiff must show that each defendant acted tortiously pursuant to a common design. *Abel, supra*. Here, the evidence showed only that defendants gave information and provided transportation to Putansu. Plaintiffs failed to present sufficient evidence to raise an issue of fact as to whether defendants acted tortiously pursuant to a common design to harm decedent. The trial court correctly granted defendants' motions for summary disposition. *Id.*

On appeal Nokes argues that a concert of action claim is no longer viable. The trial court specifically declined to address this issue, and did not rely on this argument as a basis for its decision. Therefore, we decline to consider it. *Candelaria v B C General Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999).

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ Helene N. White  
/s/ Joel P. Hoekstra